

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:)
NATHAN D. ARMSTRONG and) No. 06-02476-PCW13
GEORGENA A. ARMSTRONG,)
Debtors.) MEMORANDUM DECISION RE:
CHAPTER 13 CONFIRMATION OF
PLAN

FACTS

Nathan and Georgena Armstrong filed a voluntary petition for relief under Chapter 13 on October 3, 2006. Chapter 13 debtors are required to devote all projected disposable income to repayment of unsecured creditors. The amount of disposable income required to be paid is calculated pursuant to 11 U.S.C. § 1325(b)(1)(B). The implementing form is the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Form B22C). The Form B22C filed in this case on October 3, 2006 and amended December 13, 2006 indicates that debtors have an annualized current monthly income of \$63,012.00, which is more than the median family income in this geographic area, based on the debtors' family size. The dispute in this case concerns the expense side of the calculation.

Schedule B-Personal Property indicates the debtors own a 1998 GMC Sierra 3500 Truck. According to Schedules D and G, there is no loan or lease obligation relating to the vehicle. The GMC truck is owned "free and clear" of liens. Debtors completed the Form B22C, MEMORANDUM DECISION RE: . . . - 1

1 including, on line 28, an expense deduction of \$471.00 for
2 Transportation Ownership/Lease Expense Allowance, even though they
3 are not actually making a loan or lease payment. The Trustee
4 contends that the debtors are not entitled to the ownership/lease
5 expense because they do not have a loan or lease payment on the
6 vehicle.

7 **THE MEANS TEST**

8 As the debtors are above-median income debtors, their expenses
9 are determined pursuant to 11 U.S.C. § 1325(b)(3), which in turn
10 instructs above-median income debtors to apply 11 U.S.C. § 707(b).
11 That section is popularly known as the "means test." Section
12 707(b)(2)(A)(ii)(I) states in part:

13 The debtor's monthly expenses shall be the debtor's
14 applicable monthly expense amounts specified under the
15 National Standards and Local Standards, and the debtor's
16 actual monthly expenses for the categories specified as
17 Other Necessary Expenses issued by the Internal Revenue
18 Service for the area in which the debtor resides, as in
19 effect on the date of the order for relief, for the
20 debtor, the dependents of the debtor, and the spouse of
the debtor in a joint case, if the spouse is not
otherwise a dependent. Such expenses shall include
reasonably necessary health insurance, disability
insurance, and health savings account expenses for the
debtor, the spouse of the debtor, or the dependents of
the debtor. . . .

21 The National Standards and Local Standards referenced are the
22 collection guidelines used by the Internal Revenue Service (IRS) to
23 determine a taxpayer's ability to pay past due federal taxes. The
24 National Standards establish presumptively reasonable, necessary
25 amounts for various necessities based upon a debtor's gross income
26 and family size, but with limited exceptions, not based on
27 geographic area. The Local Standards establish presumptively
28 reasonable amounts for the necessary expenses of housing and

1 transportation based on the geographic area in which debtors reside
2 as well as family size and number of vehicles. The Local Standard
3 at issue is the transportation expense item referenced on line 28
4 of Form B22C.

5 To assist IRS agents in interpreting and applying the Local
6 Standards, the IRS publishes for its agents an Internal Revenue
7 Manual ("IRM") and Financial Analysis Handbook. The collection
8 agents are instructed in those publications to use the expenses
9 identified in the Local Standards as a "cap" or maximum. The
10 taxpayer is to be allowed either the actual expense or the Local
11 Standard, whichever is less. Eugene R. Wedoff, *Means Testing in*
12 *the New § 707(B)*, 79 Am. Bankr. L.J. 231, 256 (2005); *In re*
13 *Fowler*, 349 B.R. 414 (Bankr. D. Del. 2006). Agents are instructed
14 in the IRM that if a taxpayer has no lien or lease payment on a
15 vehicle that only a portion of the Local Standard is to be allowed
16 as an expense. In this case, that portion would be \$200.00, and
17 the Trustee argues that this is the appropriate amount to be
18 referenced on line 28 rather than the \$471.00, which is the
19 unadjusted Local Standard.

20 ISSUE

21 The issue in this case requires the Court to determine the
22 manner in which the Local Standard should be applied under the
23 "means test." Specifically, may the debtors claim the full amount
24 of the Local Standard of the Transportation/Ownership Lease Expense
25 when the vehicle is owned "free and clear" of liens.

26 ANALYSIS

27 It is an understatement to say that courts are split on this
28 issue. As of the date of this opinion, there are approximately a

1 dozen reported decisions of various bankruptcy courts determining
2 that if no payment or lease obligation relates to a vehicle, the
3 debtors are not entitled to the full expense deduction under the
4 Local Standard. These cases would "adjust" the Local Standard to
5 \$200.00 as argued by the Trustee. There are more than a dozen
6 reported bankruptcy court decisions determining that, regardless of
7 whether a payment or lease obligation exists, debtors are entitled
8 to the full expense deduction under the Local Standard. These
9 cases would utilize the "unadjusted" Local Standard of \$471.00 as
10 argued by the debtors. The recent opinion, *In re Lynch*, 2007 WL
11 1387987 (Bankr. E.D. Va. 2007), lists the reported decisions and
12 their holdings. To date, the only appellate level decision is *In*
13 *re Ross-Tousey*, ___ B.R. ___, 2007 WL 1466647 (E.D. Wis. 2007),
14 which adjusted the Local Standard.

15 **PLAIN MEANING**

16 The most interesting aspect of these conflicting decisions is
17 that each line of authority relies upon the "plain meaning" of the
18 statute. The line of authority which adjusts the Local Standard
19 when a vehicle is "free and clear" concludes that the plain meaning
20 of the statute requires an adjustment. The line of authority which
21 does not adjust the Local Standard concludes that the plain meaning
22 of the statute so requires.

23 Both lines of authority reach conflicting results after
24 application of well-recognized rules of statutory construction.
25 The meaning of a subsection of a statute must be determined in the
26 context of the entire statute and the statutory scheme as a whole.
27 *In re Rufener Const., Inc.*, 53 F.3d 1064 (9th Cir. 1995).
28 Application of this principle of statutory construction to this

1 controversy requires that the calculation of a reasonably necessary
2 expense under (A)(ii) must be read in connection with the
3 calculations of expenses under other subparts of the statute.

4 The debtors' expenses "shall be the debtor's applicable
5 monthly expense amounts" specified by the National and Local
6 Standards and "the debtor's actual monthly expenses" for certain
7 items included in "Other Necessary Expenses." When Congress
8 utilizes one word in a portion of a statute, but uses a different
9 word in another portion of a statute, it is presumed that the two
10 different words have two different meanings. *In re Enright*, 2007
11 WL 748432 (Bankr. M.D.N.C. 2007); *In re Farrar-Johnson*, 353 B.R.
12 224 (Bankr. N.D. Ill. 2006); and *In re Fowler, supra*. Use of two
13 different words is an indication that two different meanings were
14 intended. Unfortunately, recognition and application of these
15 principles of statutory construction have lead to differing
16 interpretations of the subpart § 707(b)(2)(A)(ii)(I).

17 The line of authority which adjusts the Local Standard
18 concludes that the term "applicable" requires an examination of the
19 IRM and the IRS Financial Analysis Handbook. As those IRS
20 materials provide direction to IRS agents in applying the Local
21 Standards, those materials determine the "applicable" Local
22 Standard. The line of authority which does not adjust the Local
23 Standard interprets the term "applicable" as a reference to the
24 fact that when applying the Local Standard to a particular debtor,
25 one must consider the geographic area and number of vehicles owned.
26 Those factors, and those factors alone, determine the "applicable"
27 Local Standard.

28 One is forced to conclude that the language of (ii), even when

1 read in connection with other subparts of § 707, is subject to
2 different interpretations and that there is no plain meaning. If
3 the words of the statute as written had plain, ordinary and literal
4 meanings, there would not exist two evenly balanced lines of
5 authority reaching contrary results. This Court concludes, as did
6 *in In re Sawdy*, ___ B.R. ___, 2007 WL 582535 (Bankr. E.D. Wis.
7 2007), that § 707(b)(2)(A)(ii)(I) is ambiguous.

8 LEGISLATIVE HISTORY

9 When statutory language is ambiguous, courts look to the
10 legislative history to ascertain Congressional intent. *In re First*
11 *T.D. & Inv., Inc.*, 253 F.3d 520 (9th Cir. 2001). Many of the cases
12 concluding that the unadjusted Local Standard is appropriate and
13 many of the cases concluding that the adjusted Local Standard is
14 appropriate, considered the legislative history of the "means
15 test."

16 Those cases which conclude that the Local Standard should be
17 adjusted, cite the well-known legislative policy statement that the
18 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
19 ("BAPCPA") in general, and the "means test" in particular, were
20 enacted ". . . to insure that those who can afford to repay some
21 portion of their unsecured debts is required to do so." *In re*
22 *Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006); *In re Ceasar*,
23 ___ B.R. ___, 2007 WL 777821 (Bankr. W.D. La. 2007); and *In re*
24 *Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006), quoting 151 Cong.
25 Rec. S2470 (March 10, 2005). The cases which conclude that use of
26 the unadjusted Local Standard is appropriate, recognize that
27 Congressional purpose and policy but also recognize that it
28 provides little guidance in determining which debtors are those who

1 can afford to pay.

2 The purpose of the "means test" is to identify those debtors
3 who can afford to pay. Repeating the sweeping statement that those
4 who can afford to pay should do so, is insufficient to determine
5 Congressional intent regarding application of the "means test." *In*
6 *re Fowler, supra*, and *In re Wilson*, 356 B.R. 114 (Bankr. D. Del.
7 2006) delve behind the general purpose in enacting BAPCPA and
8 examine additional legislative history. They cite to the
9 Congressional intent to require an easily applied, uniform formula.
10 Those cases reference the intent of reducing uncertainty in
11 calculating disposable income and reducing litigation on the issue
12 of how much a debtor can pay. *In re Enright, supra*, quotes a prior
13 proposed version of (ii), which required courts to look to the
14 underlying instructions and interpretations of the IRM in
15 application of the Local Standards. That version of (ii) was not
16 enacted, thus evidencing Congressional intent that courts not do
17 so. *In re Crews*, 2007 WL 626041 (Bankr. N.D. Ohio 2007) and *In re*
18 *Demonica*, 345 B.R. 895 (Bankr. N.D. Ill. 2006) relied upon the
19 Advisory Committee Note to Form B22C, which states that although
20 the IRM treats Local Standards as "caps" or maximum allowed
21 expenses, the form was intentionally developed to require the
22 unadjusted application of the Local Standard.

23 Some provisions of § 707(b) are in conflict with the broad
24 goal of requiring debtors to pay more to creditors. For example,
25 § 707(b)(2)(ii)(IV) allows actual expenses for private school
26 tuition to a maximum of \$1,500.00. Prior to BAPCPA, many courts
27 had concluded that private school tuition was not a necessary
28 expense and did not allow such expenses. *In re Watson*, 309 B.R.

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1 652 (1st Cir. B.A.P. 2004), *aff'd*, 403 F.3d 1 (1st Cir. 2005). The
2 calculation of current monthly income under BAPCPA specifically
3 excludes consideration of social security benefits or disability
4 income, § 707(b)(2)(A)(ii)(I), both of which, prior to BAPCPA,
5 would have been available for repayment of creditors. *In re Hagel*,
6 184 B.R. 793 (9th Cir. B.A.P. 1995). Restating the broad goal of
7 Congress that debtors who can afford to repay creditors should do
8 so, begs the question of how to determine who those debtors may be.

9 The purpose of § 707(b) is to provide a mechanism to identify
10 debtors who can afford to repay. If Congress had intended that
11 such debtors be identified based on actual reasonable expenses, it
12 would have so provided and, as to certain types of expenses, did so
13 provide. The transportation expense is not one of them. With
14 regard to housing and transportation expense, Congress intended
15 that such debtors be identified by use of a uniform, easily applied
16 formula, i.e., the Local Standards. It certainly could have, but
17 did not state that application of the Local Standards should be
18 applied in the same manner as described by the IRS's internal
19 policies. The intent was to require rote mathematical calculations
20 based upon the geographic area in which the debtor resides and the
21 number of vehicles.

22 **POLICY CONSIDERATIONS**

23 There are public policy arguments which support both
24 interpretations of this ambiguous statutory provision.

25 If the Local Standard is adjusted to reflect existing actual
26 debt payments or leases, there is an unfair and disparate impact on
27 the most impoverished debtors. Those who drive newer, more
28 recently acquired vehicles, receive a larger expense deduction in

1 calculating the amount available to pay unsecured creditors than
2 those who have been financially conservative and continue to drive
3 older unencumbered vehicles. Arguably, the adjustment of the Local
4 Standard penalizes those debtors who have, pre-bankruptcy, deprived
5 themselves of a more expensive but encumbered vehicle so that they
6 could pay more to creditors but rewards those debtors who have
7 chosen their own self-interest over the obligation to pay
8 creditors.

9 Typically, those debtors who have no liens or leases drive
10 older, less reliable vehicles with higher maintenance requirements
11 which, most likely, require replacement during the term of a
12 Chapter 13 plan. Thus, a question is raised whether those debtors
13 will be able to continue to make the payments required by the
14 Chapter 13 plan.

15 When Local Standards are adjusted, inconsistent and disparate
16 impact results as there is no distinction between debtors with only
17 a few remaining payments on a vehicle and those with many years of
18 remaining payments. Both debtors would have the same expense
19 deduction.

20 However, use of the unadjusted Local Standard is against
21 policy as it is inconsistent with the goal of requiring debtors
22 who, because they drive an unencumbered vehicle, can afford to pay
23 more to unsecured creditors to do so. If a debtor should need to
24 replace an older "free and clear" vehicle during the term of the
25 Chapter 13 plan, BAPCPA allows a post-plan confirmation
26 modification of the plan. Adjusting the Local Standard does not
27 necessarily prejudice debtors who drive older, less reliable
28 vehicles as such debtors are still entitled to a transportation

1 expense of \$200.00.

2 The underlying premise of some of the cases which allow
3 adjustment of the Local Standard is that adjusting the Local
4 Standard to reflect the absence of an actual existing debt or lease
5 payment is required because that is the reality of that particular
6 debtor. The likelihood of completing a plan is increased when
7 payment to unsecured creditors is based upon financial reality
8 rather than artificially imposed numbers.

9 Finally, it is a mistake to view the means test as a
10 formula for measuring the culpability of a particular
11 debtor for the circumstances that led him into
12 bankruptcy, and, hence, whether the debtor is worthy of
13 one form of relief rather than another. The means test
14 does not distinguish those who have tried hard from those
15 who have hardly tried. It is a blind legislative formula
16 that attempts to direct debtors to a chapter that
17 provides for at least some measure of repayment to
18 unsecured creditors over a period of years. Like any
19 other effort at social or economic legislation, it is not
20 perfect. . . .

21 *In re Barraza, supra*, at page 729.

22 Much can be said from a policy perspective in support of both
23 adjusting and not adjusting the Local Standard. Policy
24 considerations do not appear to be helpful in determining the
25 issue. Presumptively, Congress had all these policy considerations
26 in mind when enacting the statute. It is not for this Court to
27 select the policy which should be promoted by the statute, but only
28 to interpret the statute consistent with the policy articulated by
Congress. As stated in *In re Sawdy, supra*, at page 11:

[5] So-one can envision policy interests which support
both the debtor's position in the case at bar and the
trustee's. Because of the existence of these competing
policies, the Court does not find the policy rationale
helpful.

1 The only policy which can be ascertained for the statute is
2 that referenced in the Congressional history. The "means test" is
3 to be used to identify those debtors who can afford to pay based
4 upon a uniform, easily applied, formula for certain identified
5 expenses and based upon actual expenditures for other categories of
6 expenses or when certain circumstances articulated in the statute
7 exist.

8 **USE OF IRM/FINANCIAL ANALYSIS HANDBOOK**

9 The line of authority which adjusts the Local Standard relies
10 upon the IRM and Financial Analysis Handbook available on the IRS
11 website. The adjustment is determined based upon a calculation
12 that the IRS has determined to be appropriate in applying its Local
13 Standards. The primary rationale for concluding that such an
14 adjustment is appropriate is the reference in (ii) to the use of
15 the adjective "applicable" before the reference to the Local
16 Standards. According to this line of authority, this adjective
17 evidences Congress's intention that courts rely upon IRS
18 applications of its Local Standards. Use of the adjective
19 "applicable" when referring to the National Standards and Local
20 Standards compared with use of the word "actual" when referring to
21 other types of expenses, implies that the concept of actuality is
22 irrelevant to the use of the Standards. As explained above, this
23 Court agrees with the line of authority which does not adjust the
24 Local Standards as the term "applicable" refers to the geographic
25 location of the debtor and number of vehicles, which factors are
26 contained within the Local Standards.

27 The line of authority which adjusts the Local Standards relies
28 upon other rationale for doing so. *In re Hardacre* and *In re*

1 *Barraza, supra*, rely upon the rational assumption that those who
2 are not obligated to make debt or lease payments on a vehicle have
3 a greater ability to repay unsecured creditors. *In re Slusher*, 359
4 B.R. 290 (Bankr. D. Nev. 2007) emphasizes that in adopting the
5 "means test," Congress could have created a new system or formula
6 but choose rather to use an existing IRS system and formula. By
7 doing so, Congress made relevant and controlling, the IRS
8 interpretation and application of its formula. Nor does the
9 reliance upon the IRM result in an absurd result when applying the
10 statutory language. *In re Carlin*, 348 B.R. 795 (Bankr. D. Or.
11 2006).

12 The IRM are not statutes. They are not promulgated as part of
13 an administrative process. They are internal documents developed
14 to assist IRS agents engaged in a non-bankruptcy process, i.e.,
15 the collection of past due taxes. Absent a reference in the "means
16 test" to the IRM, which Congress chose not to do, one cannot
17 conclude that Congress intended courts to be bound by the IRM. The
18 legislative history of the statute merely indicated the internet
19 location at which the Financial Analysis Handbook may be found. *In*
20 *re Naslund*, 359 B.R. 781 (Bankr. D. Mont. 2006) and *In re Wilson*,
21 *supra*. The legislative history does not refer to the content of
22 the Financial Analysis Handbook in any way and there is no
23 indication in the legislative history that Congress considered the
24 content.

25 As noted in *In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala.
26 2007), in adopting a formula approach to determining amounts
27 debtors must repay, one Congressional goal was to reduce the amount
28 of judicial discretion in such determinations. Adjustment of the

1 Local Standard to reflect the absence of an existing, actual car
2 payment is not the only provision found in the IRM or Financial
3 Analysis Handbook. As stated in *In re Prince*, 2006 WL 3501281
4 (Bankr. M.D.N.C. 2006) at page 3:

5 To read section 707(b)(2)(A)(ii)(I) as permitting the
6 courts to comb through the Internal Revenue Manual in
7 order to pick and choose provisions to apply in a given
8 case injects great uncertainty into the process of
9 determining a debtor's expenses for purposes of the means
10 test.

11 For example, § 5.15.1.1.6, in discussing the National and
12 Local Standards, states that '[i]n some cases, based on
13 a taxpayer's individual facts and circumstances, it may
14 be appropriate to deviate from the standard amount when
15 failure to do so will cause the taxpayer economic
16 hardship.' (Footnote omitted) Having such broad
17 discretion to disregard the standards arguably is
18 tantamount to having no standards at all and would seem
19 to undermine entirely the purpose behind incorporating
20 the National and Local Standards into the means test in
21 the first instance.

22 If the term "applicable" allows reference to internal IRS
23 manuals, rationally, other considerations could be used in
24 determining whether the Local Standard is "applicable" such as the
25 condition of the vehicle, any extraordinary mileage required due to
26 debtor's employment, etc. Reference to the IRS internal manuals
27 would not be limited to the question of an appropriate expense
28 deduction for vehicles, but to other expenses referenced in both
the National and Local Standards. This is inconsistent with the
Congressional desire for an easily applied formula and a limit on
judicial discretion.

Application of the IRM and Financial Analysis Handbook to
interpret ambiguous provisions of the "means test" would result in
IRS, not Congressional intent, controlling statutory
interpretation. Such a result is not desirable.

1 **CONCLUSION**

2 Although the statute is ambiguous, a reasonable interpretation
3 is that IRS National and Local Standards are to be applied as
4 formulas to calculate the reasonably necessary expenses covered in
5 those standards. Such an interpretation furthers the Congressional
6 policy of the fairness of a uniform allowance and the avoidance of
7 discretionary adjustments. The Local Standard is not to be
8 adjusted unless required by other sections of § 707(b)(2). This
9 Court finds that the Local Standard should be applied so that the
10 debtors may claim the full amount of the Transportation/Ownership
11 Lease Expense where the vehicle is owned "free and clear" of liens.
12 Application of the applicable Local Standard in this case results
13 in a Transportation/Ownership Lease Expense of \$471.00.

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Patricia C. Williams
Patricia C. Williams
Bankruptcy Judge